87-1383

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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44 pp

QUESTION PRESENTED

Whether the $2000-per-false-claim penalty prescribed by the civil False Claims Act, 31 U.S.C. 3729-3731, when applied to a defendant who has already been convicted and punished under the criminal false claims statute (18 U.S.C. 287) for 65 false claims of $9 each, is in effect a criminal penalty prohibited by the Double Jeopardy Clause.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Morris Halper, M.D., was named as a defendant in the government's complaint in the district court, but the complaint was dismissed as against him pursuant to a stipulation.

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OPINIONS BELOW

The opinion of the district court declaring the statute unconstitutional as applied (App., *infra*, 1a-5a) is reported at 664 F. Supp. 852. A prior, superseded opinion of the district court (App., *infra*, 6a-11a) is reported at 660 F. Supp. 531.

JURISDICTION

The judgment of the district court (App., *infra*, 12a) was filed on October 21, 1987.[1] A notice of appeal to this

[1] An earlier judgment was filed on May 1, 1987. That judgment was superseded when the district court issued a new opinion, altering the relief awarded, in July 1987. The October 21 judgment was entered pursuant to the July 1987 opinion. On October 28, 1987, the district court on its own motion entered yet a third judgment (App., *infra*, 15a), which did not come to our attention until December 1987. The October 28 judgment, like the October 21 judgment, awards the United States double damages of $1170 in accordance with the court's July 1987 opinion, but does not award the additional $130,000 to which the United States is entitled under the $2000-per-false-claim penalty prescribed by the False Claims Act. The October 28 judgment

Court (App., *infra*, 13a-14a) was filed on November 19, 1987. On January 13, 1988, Justice Marshall extended the time within which to docket this appeal to and including February 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

31 U.S.C. 3729, before its amendment in 1986, provided in pertinent part:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the

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differs from the October 21 judgment only in that it explicitly awards costs to the government. The October 21 judgment, which was cited in our notice of appeal (*id.* at 13a), constitutes the court's final judgment in this case for purposes of appealing from the court's holding in its July 1987 opinion that the statute is unconstitutional as applied. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 373-374 n.10 (1984); *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952).

[2] "[A] direct appeal [under 28 U.S.C. 1252] may be taken when, as here, a federal statute has been held unconstitutional as applied to a particular circumstance." *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981) (per curiam); see *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982) (citing *Fleming* v. *Rhodes*, 331 U.S. 100, 102-103 (1947)).

> Government or a member of an armed force a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *.

31 U.S.C. 3729, as amended by Section 2 of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3153-3154, provides in pertinent part:

> (a) * * * Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * *.
>
> * * * * *
>
> * * * A person violating this subsection shall also be liable to the United States Goverment for the costs of a civil action brought to recover any such penalty or damages.

STATEMENT

1. The civil False Claims Act, 31 U.S.C. 3729-3731, was first enacted in 1863 and signed into law by President Lincoln in an effort to "stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War." *United States* v. *Bornstein*, 423 U.S. 303, 305 n.1, 309 (1976). It is "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, 99th Cong., 2d Sess. 2 (1986); see H.R. Rep. 99-660, 99th Cong., 2d Sess. 18 (1986)). "[T]his statute has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4).

In pertinent part, the statute gives the United States (31 U.S.C. 3730(a)) a civil cause of action against defined classes of persons who seek the payment of false claims by the federal government (see 31 U.S.C. 3729). The version of the statute that was in effect at the time of the false claims in this case provides that, if a defendant is determined to have committed a false claim violation within the meaning of the Act, the government is entitled to recover a civil penalty of $2000 plus double damages and costs. 31 U.S.C. 3729. The $2000-per-claim penalty remained in the statute, unchanged, from 1863 to 1986 (H.R. Rep. 99-660, *supra*, at 17).[3]

[3] On October 27, 1986, the President signed into law the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986 Amendments). The 1986 Amendments revise the civil False Claims Act to provide in most instances for a civil penalty of from $5000 to $10,000 plus triple damages and costs. See 1986 Amendments § 2, 100 Stat. 3153-3154. It is the position of the United States that (with limited exceptions) the 1986 Amendments are applicable to all cases pending on their effective date, including cases in which the false claims were made earlier. See *United States* v. *Hill*, No. MCA 84-2144-RV (N.D. Fla. Nov. 12, 1987). But see *United States* v. *Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987). The government did not assert a demand for civil penalties under the amended version of the statute in the present case, however, and accordingly the only question before this Court concerns the constitutionality of the pre-1986 version of the statute.

2. Appellee was the manager of New City Medical Laboratories, Inc. (New City), which provided medical services for patients eligible for benefits under the federal Medicare program (App., *infra*, 6a). Providers under that program are entitled to federal reimbursement, at specified rates, for services rendered to Medicare recipients. From about January 1982 to December 1983, appellee submitted 65 different false claims for reimbursement to Blue Cross and Blue Shield of Greater New York (Blue Cross), a fiscal intermediary of the Department of Health and Human Services, which administers the Medicare program (*id.* at 7a).[4] Each of the 65 claims demanded payment of $12 for a service whose performance was actually reimbursable for only three dollars (*id.* at 7a-8a). Blue Cross was unaware of the misrepresentations, and it paid New City the full amount that it requested (*ibid.*). New City was thus overpaid by a total of $585.

When the government became aware of his fraud, appellee was indicted on 65 counts under the criminal false

[4] As the district court noted (App., *infra*, 8a), the fact that appellee submitted the false claims to an intermediary rather than directly to the government does not in any way shield him from liability under either the civil or the criminal false claims statute. Congress has now codified this rule. See 1986 Amendments § 2, 100 Stat. 3154 (to be codified at 31 U.S.C. 3729(c)).

claims statute (18 U.S.C. (1982 ed.) 287), which makes it a crime to "make[] or present[] * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."[5] On July 9, 1985, appellee was convicted on all 65 counts as well as 16 counts of mail fraud. He was fined $5000 and sentenced to two years' imprisonment. App., *infra*, 8a.

3. On April 11, 1986, the government commenced this civil action against appellee under the civil False Claims Act, 31 U.S.C. 3729-3731. At the time the action was instituted, that Act provided in pertinent part that a person who "knowingly presents, or causes to be presented [to the government] a false or fraudulent claim for payment or approval," or who "knowingly makes * * * a false * * * statement to get a false or fraudulent claim approved," "is liable to the United States Government for civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains * * * and costs of the civil action" (31 U.S.C. 3729(1), (2)). Because the statute provided for a civil penalty of $2000, the government sought a total civil penalty of $130,000, *i.e.*, $2000 for each of appellee's 65 violations.[6] The government also sought double damages ($1170) and costs.

In an initial opinion filed on April 29, 1987, the district court granted summary judgment for the government on

[5] Appellee was charged, tried, and sentenced under the pre-1986 version of this statute. Section 7 of the 1986 Amendments, 100 Stat. 3169, revised the wording of this statute but did not change the substance of the offense. See 18 U.S.C. (Supp. IV) 287.

[6] When a defendant submits several fraudulent demands for payment, in general each individual false payment demand gives rise to a separate false claim violation for purposes of the False Claims Act. See *United States* v. *Bornstein*, 432 U.S. at 309 n.4; S. Rep. 99-345, *supra*, at 8, 9; H.R. Rep. 99-660, *supra*, at 21.

the question of appellee's liability (App., *infra*, 6a). Noting that appellee's conviction under the criminal false claims statute "necessarily determined" (*id.* at 8a) that he had knowingly submitted false claims, the court ruled that appellee was collaterally estopped from denying liability in this civil action (*id.* at 9a).[7]

The court, however, declined to impose the civil penalty of $130,000 that the government had requested. Stating that "the amount by which the 65 claims were inflated was $9.00 for each claim, or [a total of] $585" (App., *infra*, 10a), the court declared that "the total amount necessary to make the Government whole bears no rational relation to the $130,000 penalty the Government seeks" (*ibid.*). The court regarded a civil penalty of $130,000 as disproportionate to appellee's total overbillings, and it suggested that such a penalty would constitute, in effect, a "criminal" punishment (*id.* at 9a, 10a). Because appellee had already been criminally convicted and sentenced for his commission of the acts on which this civil action is based, the court stated that appellee "would have a valid double jeopardy defense" (*id.* at 10a) if a penalty of $130,000 were imposed in this case.

Apparently because of its double jeopardy concerns, the court construed the statute to mean that "the imposition of a civil penalty of $2000 for each false claim [is not] mandatory" (App., *infra*, 10a). The court then determined that "a civil penalty of $2,000 on 8 of the 65 claims, or $16,000, will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action" (*ibid.*). Accordingly, the court imposed on appellee a $16,000 civil penalty (*id.* at 11a).

[7] The new, amended version of the statute contains an explicit collateral estoppel provision. See 1986 Amendments § 5, 100 Stat. 3158 (to be codified at 31 U.S.C. 3731(d)).

4. The government moved for reconsideration of the district court's decision pursuant to Fed. R. Civ. P. 59(e). The government argued that it was well established that the statute requires a separate civil penalty of $2000 for each false claim and that the court therefore lacked the discretion to award a penalty of less than $130,000 in this case. The court thereupon issued a new opinion and judgment (App., *infra*, 1a-5a, 12a), agreeing with the government's statutory interpretation but holding the statute unconstitutional as applied.

The court acknowledged that it had erred in interpreting the statute to allow less than a total civil penalty of $2000 for each statutory infraction (App., *infra*, 2a).[8] The court therefore revisited the double jeopardy concerns expressed in its previous opinion. It recognized (App., *infra*, 3a-4a, 9a) that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), this Court had held that the False Claims Act's $2000 penalty provision was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause. The court nevertheless found this case distinguishable on its facts from *Hess*, because "[t]he penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government" (App., *infra*, at 4a). Focusing on a perceived "tremendous disparity between actual damage and the 'civil penalty' in this case" (*ibid.*), the court repeated its earlier statement that a penalty of $130,000 in this case would "bear[] no rational relation to the Government's loss" (*id.* at 5a). The court concluded (*ibid.*):

> [T]he $130,000 penalty sought in this case amounts to a criminal penalty for violations for which Halper has already been punished.
>
> Judgment in this amount would violate the Double Jeopardy Clause. The statute, therefore, is unconstitutional as applied to Halper, and the sought-after relief of $130,000 must be denied.

The court limited the government's recovery to double damages ($1170) and costs, with no civil penalty at all (App., *infra*, 5a).

[8] The court stated in its amended opinion that "[t]he Government now has cited to compelling authority that, in the absence of Government consent, the $2,000 penalty for each false claim is mandatory" (App., *infra*, 1a-2a). See, *e.g.*, *United States* v. *Hughes*, 585 F.2d 284, 286 (7th Cir. 1978) ("This [$2000-per-false-claim] forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount."); *Brown* v. *United States*, 524 F.2d 693, 705-706 (Ct. Cl. 1975); *United States* v. *Cato Bros.*, 273 F.2d 153, 156 (4th Cir. 1959), cert. denied, 362 U.S. 927 (1960); *United States* v. *Jacobson*, 467 F. Supp. 507, 508 (S.D.N.Y. 1979). The Senate Judiciary Committee has recently reconfirmed this understanding of the pre-1986 statute (S. Rep. 99-345, *supra*, at 8 (emphasis added)):

> In its present form, the False Claims Act empowers the United States to recover double damages * * *. In addition, the United States may recover one $2,000 forfeiture for each false claim submitted in support of a claim. *The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false.* The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages.

THE QUESTION IS SUBSTANTIAL

The district court in this case has struck down as unconstitutional the statute "that has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4). The district court's holding—that the False Claims Act's civil penalty provision is really a "criminal" penalty provision in the circumstances of this case and therefore violates the Double Jeopardy Clause—is at odds with *United States ex rel. Marcus* v. *Hess*, *supra*, and *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), in which this Court rejected

the double jeopardy analysis that the district court adopted here.

The error in the district court's decision is not limited to its inconsistency with this Court's decisions in *Hess* and *Rex Trailer*. The district court's ruling also disregards Congress's recent amendments of the False Claims Act. Although the views of a subsequent Congress are, of course, not controlling with regard to the meaning of a prior enactment, they are nevertheless instructive. In amending this statute in 1986, Congress increased the civil penalties for false claims and explicitly reaffirmed that the statute's "civil penalties" are indeed civil, not criminal, for double jeopardy and other purposes. The district court's view that the civil penalty in this case is disproportionately harsh cannot be squared with Congress's view that even more severe penalties are appropriate. By characterizing the False Claims Act's civil penalties as "civil" in some cases and "criminal" in other cases, depending on the court's view of whether the penalty is proportionate to the magnitude of the defendant's fraud in the particular case, the theory embraced by the district court also threatens serious disruption of a statutory enforcement scheme that Congress recently reaffirmed in "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, *supra*, at 2).[9]

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[9] The district court's theory, if followed, would hamper the government's ongoing enforcement efforts not only under the False Claims Act, but also under other, similar statutory schemes that provide for civil penalties in addition to criminal sanctions. See, *e.g.*, *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding Civil Monetary Penalties Act, 42 U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim); *Mayers* v. *Department of Health & Human Services*, 806 F.2d 995, 999 (11th Cir. 1986) (holding same statute "civil"), cert. denied, No. 86-1887 (Oct. 5, 1987).

1. The district court's decision is inconsistent with this Court's decision in *United States ex rel. Marcus* v. *Hess*, *supra*. In *Hess*, various electrical contractors had engaged in a collusive bidding scheme on a federally funded public works project. They were convicted under the criminal false claims statute and fined $54,000 (317 U.S. at 545). An action was then brought against the same contractors under the civil False Claims Act.[10] The complaint sought the imposition of 56 civil penalties of $2000 each, for a total civil penalty of $112,000 (317 U.S. at 540). The defendants asserted that the civil suit was barred by the Double Jeopardy Clause on the ground that imposition of a civil penalty of $112,000 over and above the previous criminal fine would constitute a second criminal punishment for the same conduct (*id.* at 548).

This Court rejected the defendants' argument. The Court began with the premise that double jeopardy attaches only in a criminal proceeding (317 U.S. at 549 (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938))):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute in question] imposes a criminal sanction.

The Court then explained that, unlike the purpose of the criminal false claims statute, which is to punish wrongdoers and "to vindicate public justice" (*Hess*, 317 U.S. at 548-549), "the chief purpose of the [civil False

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[10] The civil action was brought by a private party, in the government's name, pursuant to the False Claims Act's *qui tam* provisions (31 U.S.C. 3730(b)).

Claims Act] was to provide for restitution to the government of money taken from it by fraud" (*id.* at 551).

The Court acknowledged that, in any particular case, the civil penalty of $2000 might exceed the amount of the fraud actually perpetrated on the government. But the Court emphasized that the statute—especially when considered in light of its criminal counterpart (see 317 U.S. at 549)—was clearly intended to provide a civil remedy, and that "[t]his remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered." *Id.* at 550. The Court concluded, therefore, that there was no merit to the defendants' argument "that the $2,000 'forfeit and pay' provision is 'criminal' rather than 'civil' " (*id.* at 551).[11]

This Court's holding in *Hess* was reiterated 13 years later in *Rex Trailer Co.* v. *United States, supra.* In *Rex Trailer*, the defendant was criminally convicted of using fraud in buying surplus war assets from the government and was fined $25,000 (350 U.S. at 149). After the criminal conviction, the government filed a civil action under the Surplus Property Act of 1944, 50 U.S.C. (1946 ed.) App. 1635, seeking the imposition of five civil penalties of $2000 each based on the same five acts of fraud that gave rise to the criminal proceeding. The defendant asserted that the previous criminal conviction posed a double jeopardy bar to the government's civil penalty proceeding (350 U.S. at 150).

As in *Hess*, this Court rejected the defendant's argument. "The only question for * * * decision," the Court observed, "is whether [the civil penalty provision] is civil

[11] The phrase "forfeit and pay" came from the language of the version of the civil False Claims Act then in effect, 31 U.S.C. (1940 ed.) 231, which provided that anyone who submits a false claim against the government "shall forfeit and pay to the United States the sum of two thousand dollars" plus double damages and costs.

or penal" (350 U.S. at 150). Noting that the Surplus Property Act's civil penalty provision was "virtually identical" (*id.* at 152 n.4) to the civil penalty provision in the False Claims Act that was upheld in *Hess*, the Court followed *Hess* and concluded that the $2000 civil penalty provision at issue was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause (*id.* at 152).

The defendant in *Rex Trailer* sought to bolster its argument by using the same argument that the district court employed in the present case: that the penalty was disproportionate to the government's actual loss under the circumstances of that case. Indeed, in *Rex Trailer* the defendant's fraud had not been shown to have resulted in any damages to the government (350 U.S. at 152). The Court rejected this effort to escape from *Hess*. Repeating *Hess*'s admonition that " '[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress' " (*ibid.* (quoting *Hess*, 317 U.S. at 552)), the Court explained that the $2000 civil penalty provision was essentially a "liquidated-damage" provision (350 U.S. at 151, 153). The fact that the civil penalty provision effectively served as a liquidated-damages clause, to provide a rough, across-the-board measure of the government's recovery, did not "transform[] what was clearly intended as a civil remedy into a criminal penalty" (*id.* at 154).

The district court's approach in this case cannot be squared with this Court's explicit rejection of the defendants' double jeopardy arguments in *Hess* and *Rex Trailer*. In characterizing the False Claims Act's penalties as "criminal," the district court in this case has adopted a position that this Court has already twice rejected. See *Berdick* v. *United States*, 612 F.2d 533, 538 (Ct. Cl. 1979) (citing *Hess*; "the forfeitures required by the False Claims

Act are civil, not criminal, * * * and the double jeopardy provisions of the Fifth Amendment do not apply").

The district court erred in its effort to distinguish *Hess*. Although "[t]he penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government" (App., *infra*, 4a; see *Hess*, 317 U.S. at 540), this Court's decision did not in any way turn on the amount of damages inflicted on the government in that particular case. Indeed, *Rex Trailer* expressly rejected the defendant's double jeopardy argument in the face of a contention that the government had suffered no loss at all.

Moreover, the district court's theory that a statute can be "civil" in some cases and "criminal" in others, depending on whether it leads (in the court's view) to a disproportionate sanction, would produce bizarre consequences. Consider two proceedings both brought under the False Claims Act, one involving a $112,000 penalty for 56 false claims costing the government $100,000 and the other involving a $130,000 penalty for 65 false claims costing the government $585. If the first proceeding is "civil" (following *Hess*) and the second is "criminal" (under the decision below), then in the second case—but not the first—the government would be required to prove its case beyond a reasonable doubt. Conversely, in the first case the defendant would be entitled to take discovery under the liberal provisions of the Federal Rules of Civil Procedure, but the defendant in the second case would be allowed only the more limited discovery available in criminal cases. Indeed, under the district court's theory a case might proceed to trial as a "civil" case only later to be held "criminal" (and to require more procedural safeguards) if the evidence developed at trial led the district court to question the "proportionality" of the civil penalty or if the court of appeals disagreed with the district court's conclusion that the penalty was not unduly disproportionate.

This Court's decisions do not support any such case-by-case analysis of whether a statute is "civil" or "criminal" in nature. To the contrary, once it is established that Congress intended to create a "civil" penalty, this Court "inquire[s] * * * whether the *statutory scheme* [i]s so punitive either in purpose or in effect as to negate [Congress's] intention." *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980) (emphasis added). The question whether this statutory scheme is so punitive as to be "criminal" was answered long ago in *Hess* and *Rex Trailer*. The district court's attempt to fashion a case-specific exception to those decisions warrants review and reversal.[12]

2. In two respects, Congress's recent amendment of the statute buttresses this Court's rulings in *Hess* and *Rex Trailer* that the False Claims Act's civil penalty provision is indeed "civil" and does not implicate double jeopardy concerns. First, Congress has now raised the civil penalty from $2000 per false claim to "not less than $5,000 and not more than $10,000" per false claim. 1986 Amendments § 2, 100 Stat. 3154 (to be codified at 31 U.S.C. 3729(a)). Congress's substantial increase of the statutory penalty weighs against the district court's suggestion that imposition of the smaller, preexisting $2000 penalty in this case

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[12] The civil penalty in this particular case is as large as it is not because Congress has provided for an excessive penalty, but because the defendant has defrauded the government 65 times. See *United States ex rel. Fahner* v. *Alaska*, 591 F. Supp. 794, 801-802 (N.D. Ill. 1984) (imposing civil penalty in excess of one million dollars for defendant's commission of more than 500 False Claims Act violations; "[w]hile the total damage award in this action may appear to be excessive, it reaches such proportions for the sole reason that [the defendant] has been found to have submitted 551 separate false claims").

is excessive. Second, in amending the False Claims Act, Congress explicitly reaffirmed that the civil penalty provision is intended to be a civil sanction. Congress's own characterization of the penalty as civil is entitled to great weight and militates against the district court's contrary conclusion that the sanctions would be "criminal" in this case.

a. Prompted by extensive findings that fraud "permeates generally all Government programs" (S. Rep. 99-345, *supra*, at 2)—particularly health-care benefit programs (*id.* at 4) such as the Medicare program involved in this case (*id.* at 21)—Congress revised the False Claims Act in 1986 "[i]n order to make the statute a more useful tool against fraud in modern times" (*id.* at 2). See also H.R. Rep. 99-660, *supra*, at 21. Congress determined that "[t]his growing pervasiveness of fraud necessitates modernization of" the Act (S. Rep. 99-345, *supra*, at 2) because "some of the provisions of the Act are outdated" (H.R. Rep. 99-660, *supra*, at 17). In particular (*ibid.*),

> the current law permits the United States to recover double damages plus $2,000 for each false or fraudulent claim. This penalty has not been changed since 1863. The Congressional Research Service has reported that, based on the Consumer Price Index, the buying power of $2,000 in 1863 would be close to $18,000, today.

Thus, emphasizing that it shared "the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments" (S. Rep. 99-345, *supra*, at 17), Congress decided to strengthen the civil penalties that the government is entitled to recover from those who "plunder[] * * * the public treasury"

(*United States* v. *McNinch*, 356 U.S. 595, 599 (1958)) by making false claims.

The amended version of the statute increased the civil penalty per false claim from $2000 to any amount in the $5000-to-$10,000 range and imposed triple rather than double damages. The legislative history of the amendment makes it clear that Congress strengthened the government's civil remedies because it determined that more severe sanctions were needed in order to stem the tide of rampant fraud inflicted on the government. See H.R. Rep. 99-660, *supra*, at 18 (estimating government's loss to fraud at "hundreds of millions of dollars to more than $50 billion per year"); S. Rep. 99-345, *supra*, at 3 (giving larger estimates and noting that "[t]he cost of fraud cannot always be measured in dollars and cents, however").[13] Given Congress's substantial increase of the amount of

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[13] Congress acted in order to deter those who would defraud the government as well as to compensate the government for its monetary and nonmonetary losses caused directly and indirectly by false claims. See, *e.g.*, H.R. Rep. 99-660, *supra*, at 18. Such a purpose was well within Congress's power in enacting civil remedies. As this Court wrote in *Hess*, 317 U.S. at 550-551 (citations and footnote omitted),

> Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." This Court has noted that the general practice in state statutes of allowing double or treble or even quadruple damages. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. The law can provide the same measure of damage for the government as it can for an individual.

the statutory civil penalty, coupled with the legislative determination that the increased amount was necessary to provide the government with an adequate weapon against the "pervasive" fraud in government programs (S. Rep. 99-345, *supra*, at 3), the district court erred by substituting its judgment for that of Congress as to the excessiveness of the smaller, $2000 civil penalties sought in this case.[14]

b. Congress's recent amendments not only increased the amount of the civil penalty to which the government is entitled, but in addition reaffirmed that the statute's civil penalties are indeed "civil." Referring to Congress's addition to the statute of a provision "to make clear that in civil fraud actions, the Government is required to prove all essential elements of the cause of action [only] by a preponderance of the evidence" (S. Rep. 99-345, *supra*, at 30-31; see 1986 Amendments § 5, 100 Stat. 3158 (to be codified at 31 U.S.C. 3731(c))), the Senate Judiciary Committee took pains to explain that False Claims Act proceedings are civil in nature (S. Rep. 99-345, *supra*, at 31). The Senate report makes explicit Congress's repudiation

[14] It bears emphasis that, in raising the civil penalty from $2000 per false claim to $5000 to $10,000 per false claim, Congress was aware that the civil penalty would be substantial in cases in which the defendant commits many violations. The Senate report speaks to this very situation (S. Rep. 99-345, *supra*, at 9):

> Each separate * * * "false payment demand" constitutes a separate claim for which a forfeiture shall be imposed * * *, and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable for a forfeiture for each such form that contains false entries even though several such forms may be submitted to the fiscal intermediary at one time.

See also H.R. Rep. 99-660, *supra*, at 21.

of the notion that "the civil False Claims Act is penal in nature" (*ibid.*), and highlights "[t]he Supreme Court's rejection of [that] premise in [*Hess*]" (*ibid.*).

Congress's own characterization of the civil penalties as "civil"—in the pre-1986 statute as well as in the recent amendment—is highly probative. This Court has made clear that when "Congress has indicated an intention to establish a civil penalty" (*United States* v. *Ward*, 448 U.S. at 248) as opposed to a criminal punishment, Congress's intention is entitled to great weight and is controlling unless "the statutory scheme [is] so punitive in purpose or effect as to negate that intention" (*id.* at 248-249). This Court has admonished, moreover, that "[i]n regard to this latter inquiry, * * * 'only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [it is really a criminal and not a civil provision]' " (*id.* at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960))). Thus, when it is asserted that a statute that Congress has clearly denoted as civil is in reality a criminal statute for one purpose or another, the question is "whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transform what was clearly intended as a civil remedy into a criminal penalty' " (*Ward*, 448 U.S. at 249 (quoting *Rex Trailer*, 350 U.S. at 154)). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984) (holding forfeiture proceeding under 18 U.S.C. 924(d) "civil" and rejecting double jeopardy claim); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 235-237 (1972) (per curiam) (holding forfeiture proceeding under 19 U.S.C. 1497 "civil" and rejecting double jeopardy claim); *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding Civil Monetary Penalties Law, 42

U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim).

Especially in light of this Court's decisions in *Hess* and *Rex Trailer*, there is no basis in this case for countering the presumption that a statute ordinarily is deemed civil if Congress says it is. Indeed, the presumption in this case is particularly strong, not only because Congress has expressly labeled the False Claims Act a "civil" provision in the very language of the statute (31 U.S.C. 3729, 3730(a); see 1986 Amendments §§ 2, 3, 100 Stat. 3153-3154, 3154 (to be codified at 31 U.S.C. 3729(a), 3730(a)), but also because Congress has deliberately provided for a separate criminal analog to the False Claims Act, in 18 U.S.C. 287. "Congress labeled the sanction * * * a 'civil penalty,' a label that takes on added significance given its juxtaposition with the criminal penalties set forth in [another, separate statutory provision]" (*Ward*, 448 U.S. at 249). See *Hess*, 317 U.S. at 549 ("[t]he statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy"); *Helvering* v. *Mitchell*, 303 U.S. at 404 ("[t]he fact that the [statutory scheme] contains two separate and distinct provisions imposing sanctions [one civil and one criminal], and that these appear in different parts of the statute, helps to make clear the [civil] character of that here invoked").

Thus, Congress's recent changes to the False Claims Act confirm this Court's conclusion, in both *Hess* and *Rex Trailer*, that the Act's "civil penalty" (31 U.S.C. 3729) scheme does not implicate the Double Jeopardy Clause. The district court sought to distinguish *Hess* on the basis of the perceived disproportionality of the penalty in this case, but the distinction is unavailing. The government is entitled to recover a full civil penalty even in cases in which no money is paid out and there are no provable damages: "The United States is entitled to recover such forfeitures

solely upon proof that false claims were made, without proof of any damages." S. Rep. 99-345, *supra*, at 8; see *United States* v. *Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978) ("[a] false claim is actionable under the [False Claims] Act even though the United States has suffered no measurable damages from the claim").

Given the endemic abuse that Congress has found to exist in government programs such as Medicare, imposition of a civil penalty of $2000 ($5000 to $10,000 under the new statute) against an individual who defrauds the government is reasonable and is well within Congress's legislative power. Even when a defendant's false claim nets him little or no gain, the defendant's fraudulent conduct imposes on the government an "extremely costly" burden of investigation and prosecution. *Mayers* v. *Department of Health & Human Services*, 806 F.2d 995, 999 (11th Cir. 1986) (upholding administrative imposition of civil penalty of close to two million dollars in Medicare fraud case brought under the Civil Monetary Penalties Act), cert. denied, No. 86-1887 (Oct. 5, 1987); cf. *Hess*, 317 U.S. at 552 (stressing "the inherent difficulty of choosing a proper specific sum which would give full restitution"). The civil penalty in this case is substantial not because Congress has provided for an excessive sanction, but because the defendant has defrauded the government 65 times. That appellee cheated the government many times does not transform the government's civil remedy into a criminal punishment.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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FEBRUARY 1988

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA

- against -

IRWIN HALPER, DEFENDANT

[Filed July 28, 1987]

OPINION

SWEET, D. J.

By opinion dated April 23, 1987, this court granted summary judgment in favor of the United States (the "Government") and against defendant *pro se* Irwin Halper ("Halper") on sixty-five claims of Medicare fraud under the False Claims Act, 31 U.S.C. §§ 3729-3731. Although the Government asked for a sum of $130,000, or a $2,000 "civil penalty" for each of the sixty-five false claims, as provided by 31 U.S.C. § 3729, this court imposed a penalty of $16,000. The Government now moves for an order granting reargument pursuant to Local Civil Rule 3(j) and amendment of the judgment pursuant to Fed.R.Civ.P. 59(e) to grant it the full amount sought in the complaint. The motion for reargument is hereby granted, and the judgment will be amended in accordance with this opinion.

In the April 23 opinion, this court, noting that the Government had not briefed the issue, concluded that the imposition of a civil penalty of $2,000 for each claim is not mandatory under § 3729. The Government now has cited to compelling authority that, in the absence of Govern-

ment consent, the $2,000 penalty for each false claim is mandatory. *See United States v. Diamond*, No. 86 Civ. 2121 (S.D.N.Y. April 14, 1987) (Walker, J.); *United States v. Jacobson*, 467 F. Supp. 507, 508 (S.D.N.Y. 1979) (Weinfeld, J.); *United States v. Hughes*, 585 F.2d 284, 286 (7th Cir. 1978); *Brown v. United States*, 524 F.2d 693, 705-06 (Ct. Cl. 1975); *cf. United States v. McLeod*, 721 F.2d 282, 285 (9th Cir. 1983); *United States v. Dinerstein*, 362 F.2d 852, 855-56 (2d Cir. 1966); *United States v. Rapoport*, 514 F. Supp. 519, 523 (S.D.N.Y. 1981) (Goettel, J.); *United States v. Silver*, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 505 (2d Cir. 1975). *But see Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975). The Government effectively distinguishes the case cited by the court, *United States v. Greenberg*, 237 F. Supp. 439 (S.D.N.Y. 1965) (Feinberg, J.), on the grounds that the Government took the position in *Greenberg* that the "number of forfeitures is within the discretion of the court." *Id.* at 445. Thus, this court concludes that it was in error and that the imposition of $2,000 for each of the sixty-five false claims is mandatory.

Nevertheless, a $130,000 sanction cannot be imposed, since such imposition in the present circumstances would violate the Double Jeopardy Clause.

The Fifth Amendment guarantee against double jeopardy protects against 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The protection against multiple punishments is implicated here, since Halper has already been convicted of criminal charges and sentenced to two years and a $5,000 penalty for these same acts. As the

Supreme Court said in *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168, 173 (1874):

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

Of course, the application of a penalty that is more than the "precise amount of so-called actual damage" is not necessarily punishment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943). In *Hess*, the Supreme Court distinguished between "civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *Id.* at 548-49. Only those actions intended to vindicate public justice are to subject the defendant to double jeopardy. The court concluded that the provision under the predecessor statute to the False Claims Act allowing for double damages and a $2,000 penalty was remedial in nature. The Court noted that federal and state statutes have allowed treble and even quadruple damages, and that Congress could stay within the common law tradition and impose punitive damages. *Id.* at 550. Most importantly, the Court concluded that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *Id.* at 551-52.

The Court obviously gave great deference to Congress' intent in enacting the statute, focusing on the remedial purpose of the statute in concluding that it was not punitive. This court, of course, is bound by the Supreme

Court's conclusion that the statute was meant to be remedial. Nevertheless, the *Hess* Court did not stop with an analysis of Congress' intent; instead, it inquired, in the words of Justice Frankfurter's concurrence, into whether the penalty was punitive because it exceeded any amount "that could reasonably be regarded as the equivalent of compensation for the Government's loss." *Id.* at 554 (Frankfurter, J., concurring). The opinion of the Court examined the effect of the penalty, and stated:

> We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.

Hess, 317 U.S. at 549 (*citing Helvering v. Mitchell,* 303 U.S. 391, 401 (1983)). The penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government.

In the present case, we *can* say, in the words of *Hess,* "that the remedy now before us . . . will do more than afford the government complete indemnity for the injuries done it." The government cites no cases involving sums that even begin to approach the tremendous disparity between actual damage and the "civil penalty" in this case. *See Berdick v. United States,* 612 F.2d 533, 538 (Ct.Cl. 1979) (penalty of $72,000 where actual loss approximated $1,546); *Murray & Sorenson, Inc. v. United States,* 207 F.2d 119, 122-23 (1st Cir. 1953) (penalty unreported). Concededly, most of the cases have not examined the amount of the penalty in terms of its relationship to actual loss. *But see Peterson v. Richardson,* 370 F. Supp. 1259, 1267 (N.D. Texas 1973), *aff'd sub nom. Peterson v. Weinberger,* 508 F.2d 45 (5th Cir.), *cert. denied,* 423 U.S. 830 (1975).

Neverthless, a penalty of $130,000 for an out-of-pocket loss by the Government of $585, not including the expense of investigating and prosecuting this defendant, is "punishment." As stated in the April 24 opinion, "a civil penalty designed to make the government whole cannot be entirely unrelated to actual damages suffered and expenses incurred by the government." A penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss. Thus, the $130,000 penalty sought in this case amounts to a criminal penalty for violations for which Halper has already been punished.

Judgment in this amount would violate the Double Jeopardy Clause. The statute, therefore, is unconstitutional as applied to Halper, and the sought-after relief of $130,000 must be denied. The provision for double damages, however, remedying the difficulty of calculating the Government's losses and expenses, passes Double Jeopardy scrutiny, and will be applied to give the Government judgment in the amount of two times $585, or $1,170, and the costs of the civil action.

The judgment will be amended in accordance with this opinion.

IT IS SO ORDERED.

New York, N.Y.
July 27, 1987

/s/ R. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA

- against -

IRWIN HALPER, DEFENDANT

[Filed Apr. 24, 1987]

OPINION

SWEET, D. J.

In this action brought by the United States (the "Government") against the defendant *pro se* Irwin Halper ("Halper") for the filing of allegedly inflated Medicare claims in violation of the False Claims Act, 31 U.S.C. §§ 3729-3731, the Government has moved for summary judgment. Because Halper is collaterally estopped from denying the facts which entitle the Government to judgment in its favor, the motion for summary judgment is granted.

The following findings and conclusions are made on the affidavit, memorandum of law, and exhibits submitted by the Government, and the letter in opposition from Halper dated January 10, 1987.

The Facts

At all times relevant to the complaint, Halper was manager of New City Medical Laboratories, Inc. ("NCML"), a corporation providing medical services to patients eligible for Medicare. Since January, 1982, pro-

viders of Medicare services have been instructed to use certain billing procedure codes on claims filed with Blue Cross and Blue Shield of Greater New York ("Blue Cross"), the fiscal intermediary of the United States Department of Health and Human Services. Blue Cross made available to each provider manuals listing the Medicare procedure code corresponding to each type of medical service and the cost Medicare would pay to providers for that service.

In addition to the procedure codes corresponding to each particular medical service, the manual specified two procedure codes to be included on Medicare claim forms for additional reimbursement to providers who had to travel to a private home, a nursing home or a Skilled Nursing Facility to perform a medical service. The "9018" procedure code was the proper code for seeking reimbursement for services performed on the first or only patient seen at such a facility. The "9019" procedure code was the proper code for seeking reimbursement for services performed on each subsequent patient seen on the same day at the same facility. According to the manuals, at all relevant times, the reimbursement allowed by Medicare for services billed under the "9018" code was either $10.00 or $12.00, and the reimbursement allowed by Medicare for services billed under the "9019" code was $3.00.

From in or about January, 1982 until in or about December, 1983, Halper submitted 65 claim forms that falsely characterized certain services performed by NCML as services reimbursable under the higher-priced "9018" procedure code rather than the "9019" code, even though they were performed not on the first or only patient but on subsequent patients at a particular facility on a particular day. Blue Cross, unaware of the foregoing circumstances, made payment on the Medicare claims at the higher "9018"

rate when the claims should have been paid at the lower "9019" rate.

On July 9, 1985, Halper was convicted of 65 counts of submitting false claims in violation of 18 U.S.C. §§ 2 and 287, based on the same acts alleged in the complaint in the present action. He was sentenced to two years and a fine of $5,000.

Collateral Extoppel

The False Claims Act is violated by anyone not a member of the armed services of the United States who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. § 3729(2). The fact that Halper submitted false claims to Blue Cross, the Government's fiscal intermediary, rather than directly to the Government, is of no significance. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 544-45 (1943); *United States v. Bornstein,* 361 F. Supp. 869, 875 (D.N.J. 1973), *aff'd in relevant part,* 504 F.2d 368 (3d Cir. 1974), *rev'd on other grounds,* 423 U.S. 303 (1976). The elements of the criminal false claims statute, 18 U.S.C. § 287, under which Halper was convicted, are identical to 31 U.S.C. § 3729(2) in all relevant respects. The criminal statute makes it a crime to present to the Government "any claim upon or against the United States, or any department or agency thereof, knowing such claims to be false, fictitious or fraudulent."

In this civil case, the Government can rely on the criminal conviction obtained against Halper to establish issues which were necessarily determined by the judgment of conviction. *United States v. Greenberg,* 237 F. Supp. 439, 442 (S.D.N.Y. 1965). Since the conviction necessarily determined that Halper submitted claims to the Government "knowing such claims to be false, fictitious, or fraud-

ulent," Halper cannot challenge that finding on this motion for summary judgment. *See United States v. Thomas,* 709 F.2d 968, 972 (5th Cir. 1983) ("Because of the existence of a higher standard of proof and greater procedural protection in a criminal prosecution, a conviction [under the criminal false claims statute] is conclusive as to an issue arising against the criminal defendant in a subsequent civil action"); *Berdick v. United States,* 612 F.2d 533, 537 (Ct.Cl. 1979); *Sell v. United States,* 336 F.2d 467, 474-75 (10th Cir. 1964). Since Halper is collaterally estopped from creating a genuine issue of material fact, the Government is entitled to summary judgment under the False Claims Act.

Damages and Forfeiture

Title 31 U.S.C. § 3729 provides that a person who knowingly makes a false statement to get a false claim approved "is liable to the United States Government for a civil penalty of $2,000, an amount equal to two times the amount of damages the Government sustains because of the act of that person, and the costs of the civil action . . . ."

The Supreme Court has held that a provision for a civil penalty of $2,000 plus twice the Government's damages is not in itself a criminal penalty giving rise to a claim of double jeopardy, reasoning that the purpose of such a provision is to ensure that the Government is fully compensated for any damages it has incurred. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 548-52 (1943); *Berdick v. United States, supra,* 612 F.2d at 538; *Murray & Sorenson, Inc. v. United States,* 207 F.2d 119, 122-23 (1st Cir. 1953). Therefore, the standard for determining whether a penalty is criminal is not whether the Government can prove that the penalty imposed is equal to the Govern-

ment's actual damages. Instead, a court must take into account the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages. Nevertheless, a civil penalty designed to make the Government whole cannot be entirely unrelated to actual damages suffered and expenses incurred by the Government.

Were this court to grant the relief the Government seeks, the statute as applied would violate the Double Jeopardy Clause. The Government seeks to recover $130,000, representing the $2,000 allotted by statute for each of the 65 false claims set forth in the complaint. At most, however, the amount by which the 65 claims were inflated was $9.00 for each claim, or $585. Even adding to that amount the Government's expense in investigating and prosecuting this action, the total amount necessary to make the Government whole bears bear no rational relation to the $130,000 penalty the Government seeks. *See Peterson v. Richardson*, 370 F. Supp. 1259, 1267 (N.D.Texas 1973), *aff'd*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975).

Although the Government has not briefed the issue, the imposition of a civil penalty of $2,000 for each false claim does not appear to be mandatory under the statute. *See United States v. Greenberg*, 237 F. Supp. 439, 445 (S.D.N.Y. 1965). If it were, under the circumstances of this case, Halper would have a valid double jeopardy defense, *Hess, supra*, 317 U.S. 537, notwithstanding. Of course, not considered in this determination is the $5,000 criminal fine already imposed on Halper for deterrence and as a penalty. However, a civil penalty of $2,000 on 8 of the 65 claims, or $16,000, will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action.

Although this is at best an approximation of the amount required to make the Government whole, the Government, in keeping with the relief it seeks, has submitted no evidence of its expenses in this action.

Therefore, summary judgment in the amount of $16,000 is granted in the Government's favor.

IT IS SO ORDERED

DATED: New York, N.Y.
April 23, 1987

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA, PLAINTIFF

- against -

IRWIN HALPER, DEFENDANT

[Filed Oct. 21, 1987]

AMENDED JUDGMENT

Plaintiff having moved for reargument and for amendment of the judgment filed on May 1, 1987, and the Court having granted the motion to reargue and having issued an opinion dated July 27, 1987 reducing plaintiff's damage award to $1,170, it is hereby ORDERED, ADJUDGED and DECREED that the judgment filed on May 1, 1987 is vacated and that plaintiff is hereby awarded judgment in the amount of $1,170 against defendant.

New York, New York
October 20, 1987

/s/ Robert W. Sweet
ROBERT W. SWEET
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA, PLAINTIFF

v.

IRWIN HALPER, DEFENDANT

[Filed Nov. 19, 1987]

**NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the judgment of this Court filed in the above-captioned matter on October 21, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101(a).

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General
RUDOLPH W. GIULIANI
United States Attorney

/s/ Michael Jay Singer
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/s/ Thomas M. Bcndy

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NOVEMBER 1987

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA

- against -

IRWIN HALPER, DEFENDANT

[Filed Oct. 28, 1987]

JUDGMENT

SWEET, D. J.

Pursuant to this court's opinion of July 27, 1987, amending an earlier opinion of April 23, 1987, judgment will be entered in this case in the amount of $1,170.00 in accordance with the July 27 opinion with costs.

IT IS SO ORDERED

New York, N.Y.
October 26, 1987

/s/ Robert W. Sweet

ROBERT W. SWEET
U.S.D.J.

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